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BEFORE THE ARIZONA CORPORATION COMMISSION

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CHAIRMAN

JIM IRVIN
COMMISSIONER

WILLIAM A. MUNDELL
COMMISSIONER

MIKE GLEASON
COMMISSIONER

JEFF HATCH-MILLER
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	)))	DOCKET NO. RT-00000F-02-0271

QWEST CORPORATION'S COMMENTS REGARDING THE STAFF'S LATE-FILED EXHIBIT

Qwest Corporation ("Qwest") respectfully submits these comments in response to the Staff's post-hearing exhibit demonstrating how the Staff calculated the upper ceiling of fines that the Staff believes could be imposed under A.R.S. 40-424 and the fines the Staff recommends pursuant to A.R.S. 40-425. *See* Pre-Filed Testimony of Marta Kalleberg, at 87:20-89:2. The Staff provided this post-hearing exhibit at the Hearing Examiner's direction after Commissioner Gleason and Qwest requested information about how the Staff calculated its $15,000,000 contempt penalty.

With respect to Qwest's agreements with Eschelon and McLeod and agreements involving non-participation provisions, the Staff recommends penalties based on the Commission's contempt authority in addition to the Staff's "non-monetary" penalties. *See* Pre-

Filed Testimony of Marta Kalleberg, at 87:20-95:18. The Staff's penalty recommendations raise a host of legal and factual issues that Qwest will address in its post-hearing brief, 1/ and it shall suffice for present purposes to say that Qwest does not believe the law or the facts permit the Commission to impose contempt penalties at all. But to the extent that the Staff based its proposed penalty amount upon its calculation of the maximum amount that it divined from that statute, the Commission should know – and Qwest would have established on cross-examination, had the exhibit been available during the hearing – that the Staff's analyses and calculations are flawed in numerous and material respects.

However, the guidelines followed by the Staff in performing its calculations must be corrected in several regards. First, in calculating the ending date of an agreement, the Commission should use as a maximum cut-off date for penalties the earliest of the date that an agreement was (a) filed; (b) provided to the Commission; (c) terminated; or (d) superseded. Instead, the Staff asserts that several violations continued through March 20, 2003, the date the Staff last used its spreadsheet to calculate penalties. It is fundamentally unfair to assess continuing – and ever-increasing – penalties against Qwest for the time required to open and resolve this docket. Indeed, Qwest provided the agreements at issue to the Commission and to the Staff as requested when the Commission opened this docket. The Staff opened this docket for the Commission to investigate Qwest's compliance with Section 252(e) on April 8, 2002. Qwest urged the Hearing Examiner to adopt an expedited schedule to achieve a quick resolution of the matter. *See* Procedural Order (Nov. 7, 2002). In fact, the Staff and other parties have

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1/ These issues include whether the Commission's contempt authority can permissibly be used to impose a fine for past conduct, whether the Commission can impose two types of financial penalties (which the Staff refers to as monetary and non-monetary penalties, although acknowledging both have financial consequences), and whether the nonfiling of the agreements was in fact "intentionally and willfully" in disregard of a Commission Order.

requested delays to prepare testimony (and Qwest has not), and yet the Staff now asserts that Qwest can and should be penalized for assenting to those requests.

Second, both the Staff and RUCO characterized the six Eschelon agreements and the eight McLeod agreements as each comprising a single, multifaceted transaction. *See* Pre-Filed Testimony of Marta Kalleberg, at 19:1-21:8, 36:18-38:6; Pre-Filed Testimony of W. Clay Deanhardt, at 14:14-15:15; 54:17-55:9; 55:21-56:4. As discussed below, Qwest does not agree that each of the agreements are "interconnection agreements" that must be filed under Section 252(e), but, in any event, both the Staff and RUCO premise their arguments on the assumption that a number of these agreements are inter-related and constitute a single transaction or agreement with Eschelon and McLeod. That suggests that each agreement cannot serve as a separate basis for penalties and, instead, that they are properly viewed as a single unit for penalty purposes.

Third, the Staff's proposed assessment of penalties for each individual agreement is particularly problematic with regard to agreements that are not themselves subject to Section 252. For example, the Staff triple counts the alleged discount provided to McLeod by recommending that penalties be assessed for both Purchase Agreements with Qwest Communications Corporation ("QCC") and the alleged oral agreement. The discount agreement, if the Commission decides it existed, is the only one of these three agreements that would fall within the filing requirement of Section 252. The McLeod Purchase Agreement is a commitment by McLeod to purchase products and services from QCC and does not include any commitment by QCC that is subject to the Section 251/252 regulatory framework, while the Qwest Purchase Agreement is a commitment by QCC to purchase a minimum amount of products from McLeod. Agreements by QCC to purchase goods or services from vendors,

including CLECs, are not regulated by the 1996 Act. The two Purchase Agreements do not pertain to matters covered by Section 251(b) and (c) and therefore do not provide a separate basis for penalties. *See generally* FCC Order.

In addition to triple counting any penalties attributable to the alleged oral agreement for a discount with McLeod, the Staff extends the duration of the agreement by calculating the start date as October 1, 2000 and the end date of the agreement as September 19, 2002. In fact, as even the Staff's testimony acknowledges, the oral agreement was allegedly formed contemporaneously with the October 26, 2000 execution of the Purchase Agreements. *See* Pre-Filed Testimony of Marta Kalleberg, at 43:12-15. As a result, the correct start date for a penalty calculation was the date the agreement should have been filed – in other words, thirty days from the date it was signed, not from the date it was effective. Otherwise, the Commission would be punishing conduct before it had even occurred. Moreover, the Staff's end date is incorrect. Under the terms of the settlement, the parties agreed on a "cut-off date" of June 30, 2002 that served as the date up to which the parties released all claims, including any claims related to the alleged oral discount agreement. Thus, although the settlement agreement was effective on execution, the settlement amount was calculated through only June 30, 2002. *See* Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 6:22-25. Further, Qwest provided the Purchase Agreements to the Staff well before June 30, 2002. And, the cut-off date for any penalty calculation should be the earlier of either Qwest's provision of information to the Staff or the agreements' termination date.

Similarly, the Staff doubles any penalties attributable to the alleged discount provided to Eschelon by recommending penalties based on the November 15, 2000 Purchase Agreement with Eschelon. As the Staff stated in its testimony, this Purchase Agreement was one

of six agreements entered into on the same day, and the Staff appears to include this agreement in its penalties calculation because of its relation to other agreements. Again, however, only agreements that contain forward-looking terms related to Section 251(b) or (c) services are subject to Section 252 and can therefore arguably serve as the basis for penalties. *See* FCC Order, at ¶ 8. The Purchase Agreement – which does not itself pertain to Section 251/252 – cannot serve as a separate basis for fines.

The November 15, 2000 *Confidential Billing Settlement Agreement* with Eschelon also does not provide a separate basis for penalties. As the FCC stated in its October 4, 2002 Order, settlement agreements with only backward looking consideration are not within the filing requirement. *See* Memorandum Opinion and Order, WC Docket No. 02-89 (Oct. 4, 2002), at ¶ 12. This agreement states on its face that it is a settlement agreement, and there is no non-speculative testimony to the contrary. The only provisions with any arguably forward-looking aspect are contained in paragraph 1, in which the parties discuss a "new platform[,] which is currently being created by the Parties." Once the platform was created, the terms were contained in a filed interconnection amendment approved by the Arizona Commission. *See* Exhibit LBB-5. Thus, this agreement contains either a settlement of a historical dispute or simply evidences an intention to enter into and file an interconnection agreement, which in fact occurred. Thus, this contract does not contain any terms that should be subject to a filing requirement and is not properly the subject of penalties.

The Staff also recommends penalties on the basis of contracts containing terms related to regulatory non-participation or non-opposition. As a general matter, the filing obligation is limited to agreements pertaining to Section 251(b) and (c) services, as the FCC stated in its October 4, 2002 Order. *See* FCC Order, at ¶ 8. The public interest evaluation is part

of the consideration for approval of an agreement that must be filed under Section 252(e), not a separate and independent requirement for all voluntarily negotiated agreements. *See* 47 U.S.C. § 252(e)(2)(A). As a result, contracts that contain non-participation agreements but do not involve Section 251(b) and (c) services – such as the April 4, 2000 Agreement between AT&T, U S WEST, 2/ and Qwest and the December 24, 2001 *Confidential Billing Settlement Agreement* with Allegiance 3/ – are not within Section 252(e)'s filing requirement and should not serve as the basis for penalties for nonfiling here. In other words, a day-by-day penalty calculation to account for a delay in filing does not match the allegation that Qwest should not have entered into these types of provisions.

With regard to several other agreements, the Staff overstates the number of days the agreements were in effect or not available to the Commission:

- Although the Staff suggests an end date of March 20, 2003 for the February 28, 2000 *Confidential / Trade Secret Stipulation* with Eschelon, every term of that agreement that applied in the state of Arizona had been superseded by December 22, 2000. Paragraph 7's provisions related to reciprocal compensation were superseded by paragraph 1.2 of Amendment No. 7 to the parties' interconnection agreement, filed for Commission approval on December 22, 2000 and approved on February 2, 2001. Paragraph 10 related to the suspension of termination liability assessments only in the State of Minnesota and had no application in

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2/ In this agreement, Qwest and U S WEST agreed not to support open access regulations within its 14-state territory in exchange for AT&T's agreement to withdraw from opposition to the merger between Qwest and U S WEST. Neither of these provisions involved Section 251(b) or (c) services.

3/ This agreement constituted an agreement between the parties to amend their interconnection agreement, an agreement that is not itself subject to Section 252. Subsequently, the proposed amendment was formalized when the parties filed an Amendment to their Interconnection Agreement relating to coordinated installation with no testing. That Amendment was filed with the Commission for approval on June 6, 2002, long before the Staff's proposed end date of March 20, 2003.

Arizona. 4/ Paragraphs 11 and 12 related to a dedicated provisioning team. These terms were superseded by the *Trial Agreement* dated May 1, 2000. In addition, paragraph 2.10 of Amendment No. 7 to the parties' interconnection agreement (filed December 22, 2000) disclosed the existence of a dedicated provisioning team and contained essentially the same level of detail as the *Confidential / Trade Secret Stipulation*'s provisions. Finally, paragraph 14 contained certain dispute resolution procedures and was superseded by the escalation process letter dated November 15, 2000. Accordingly, the maximum day count for this agreement is much shorter than calculated by the Staff.

- The maximum day count for the July 3, 2001 Status of Switched Access Minute Reporting Letter with Eschelon is also shorter than calculated by the Staff. The Staff is correct that the Letter Agreement was formally terminated by the March 1, 2002 settlement agreement between Qwest and Eschelon. However, the terms in paragraph 3 expressly offered a credit to Eschelon only when Qwest failed to provide accurate daily usage information until a mechanized process for UNE-Star was in place. A mechanized process was implemented on November 8, 2001, thereby superseding the terms of paragraph 3. *See* Attachment 1, Qwest's Response to Staff 06-006S1. 5/ Under the terms of paragraph 5 of the Letter Agreement, Qwest agreed to pay Eschelon $2/line/month for Qwest's intraLATA toll traffic terminating to customers served by Eschelon's switch. This provision relates to access service provided by Eschelon to Qwest and not to a service or element provided by Qwest to Eschelon. Therefore,

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4/ In addition, this term was subsequently superseded by an October 2, 2001 order by the Minnesota Commission.

5/ Qwest respectfully requests that this information request and response be admitted as Exhibit Q-16.

paragraph 5 does not fall within the filing requirements of Section 252 and cannot be the basis of any penalties.

- The Staff mistakenly indicates that the November 15, 2000 Daily Usage Information Letter terminated on May 1, 2002. In fact, that agreement was terminated in the March 1, 2002 settlement agreement between the parties.

- The Staff also calculates the end date of the March 1, 2002 Settlement Agreement with Eschelon as March 20, 2003. That agreement was provided to the Arizona Commission on April 17, 2002. Similarly, other agreements (including the July 21, 2000 *Trial Agreement* with Eschelon, the July 31, 2001 *Implementation Plan* with Eschelon, the April 28, 2000 *Confidential Billing Settlement Agreement* with McLeod, and the October 26, 2000 *Escalation Procedures* Letter with McLeod) were submitted to the Commission on March 15, 2002, yet the Staff calculates the end dates much later.

As discussed above, Qwest does not concede that any penalties pursuant to A.R.S. 40-424, and certainly not the maximum penalties, are either appropriate or permissible in this matter. However, to the extent that Staff bases its recommended penalties on the supposed maximum penalty under that provision, the Staff's calculation of that maximum is flawed.

DATED this 15TH day of April 2003.

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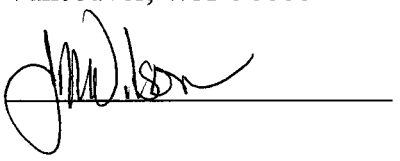

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Arizona
RT-00000F-02-0271
STF 06-006S1-Correction

INTERVENOR: Arizona Corporation Commission Staff

REQUEST NO: 006S1-Correction

In Exhibit LBB-1 of the direct testimony of Larry B. Brotherson Qwest states that the Letter from Qwest Regarding Daily Usage Information dated 11/15/00 was terminated by the Settlement Agreement dated March 1, 2002, and the completion of the transfer to a mechanized process. When was the transfer to a mechanized process completed?

RESPONSE:

Eschelon began using the mechanized Daily Usage Information process in November 2001.

Respondent: Legal and Arturo Ibarra

SUPPLEMENTAL RESPONSE DATED 01/24/03:

Qwest began operating the mechanized Daily Usage Information process on November 8, 2001. Qwest and Eschelon continued using the manual process, in parallel with the mechanized process, through April usage, which was billed on May 21, 2001.

Respondent: Legal and Arturo Ibarra

CORRECTION DATED 01/27/03:

Qwest began operating the mechanized Daily Usage Information process on November 8, 2001. Qwest and Eschelon continued using the manual process, in parallel with the mechanized process, through April usage, which was billed on May 21, **2002**.

Respondent: Legal and Arturo Ibarra

EXHIBIT 1